NOT DESIGNATED FOR PUBLICATION
ARKANSAS COURT OF APPEALS
D.P. MARSHALL JR., Judge

DIVISION IV

CACR06-1427

12 September 2007

PAUL LAMONT WARDLOW, APPELLANT

v.

STATE OF ARKANSAS, APPELLEE

AN APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT [CR-2006-41]

THE HONORABLE CHARLES EDWARD CLAWSON, JR., JUDGE

AFFIRMED

After stopping Paul Wardlow for driving a Kia Sportage with expired tags, police discovered that he had warrants out for his arrest. The police arrested him and performed an inventory search of the vehicle. During the search, the officers found a .22 caliber rifle in plain view behind the driver's seat. A jury later convicted Wardlow of being a felon in possession of a firearm. Ark. Code Ann. § 5-73-103 (Repl. 2005).

Wardlow first challenges the sufficiency of the evidence supporting his conviction. He argues that, although he was the only person in the vehicle, neither

it nor the rifle belonged to him. He also argues that he could not see the gun while he was driving.

To convict Wardlow, the State had to prove that he constructively possessed the rifle by exercising care, control, and management over it. *Polk v. State*, 348 Ark. 446, 452, 73 S.W.3d 609, 613–14 (2002). A police officer testified that the gun was in plain view behind the driver's seat and within easy reach from where Wardlow was sitting in this small vehicle. Another officer testified that Wardlow told him that he (Wardlow) saw the rifle in the SUV, but did not remove the .22 because it did not belong to him. Viewing the record in the light most favorable to the State, substantial evidence supports Wardlow's possession conviction. *Davis v. State*, 350 Ark. 22, 30, 86 S.W.3d 872, 877-78 (2002).

Wardlow next argues that the circuit court erred in ruling that, if he testified, the State could cross-examine him about his prior conviction for being a felon in possession of a firearm. He contends that the rationale of *Ferguson v. State*, 362 Ark. 547, 210 S.W.3d 53 (2005), should extend to these circumstances: because he stipulated to his prior convictions, Wardlow argues that the State should not have been allowed to cross-examine him about the particulars of any of those convictions if he chose to testify. The circuit court, relying on Arkansas Rule of Evidence 404(b), ruled that the State could cross-examine Wardlow about his one conviction for the

same crime he was charged with here—possession of a firearm by a felon—but not about any of his other prior convictions.

We have some doubt about whether Wardlow preserved this point for appeal. He chose not to testify in his own defense. Instead, Wardlow proffered his testimony. Our cases are clear that, under Arkansas Rule of Evidence 609, a defendant must testify to preserve for appellate review the claim of improper impeachment with a prior conviction. *Harris v. State*, 322 Ark. 167, 171, 907 S.W.2d 729, 731 (1995). A proffer is insufficient. *Ibid.* We have no precedent, however, for applying this preservation rule in the context of a Rule 404(b) ruling about cross-examining a defendant who has made a *Ferguson* stipulation. We leave it to our supreme court to answer this preservation question in a case where it makes a difference. Here it does not. Even if Wardlow preserved this point, we see no reversible error.

The circuit court did not abuse its discretion by ruling that it would allow evidence about Wardlow's one prior conviction for the same offense he was being tried for in this case. *Owens v. State*, 363 Ark. 413, 420, 214 S.W.3d 849, 853 (2005) (standard of review). The court was careful not to allow cross-examination about all of Wardlow's prior convictions. Our cases make plain that this prior-conviction evidence was admissible under Rule 404(b) because it was independently relevant evidence that Wardlow did not make a mistake about possessing the rifle or

accidentally possess it. *Saul v. State*, 365 Ark. 77, 85–86, 225 S.W.3d 373, 379–80 (2006). This precedent controls. Wardlow's strategic stipulation that he was a convicted felon does not change the evidentiary analysis about the admissibility on cross-examination of his one prior conviction for being a felon in possession of a gun.

Finally, Wardlow criticizes our supreme court's holdings in *George v. State*, 306 Ark. 360, 813 S.W.2d 792 (1991), and *Turner v. State*, 325 Ark. 237, 926 S.W.2d 843 (1996), and asks that we re-evaluate those cases in light of *Old Chief v. United States,* 519 U.S. 172 (1997). We lack the authority, however, to overrule a decision of our supreme court.

Affirmed.

BIRD and HEFFLEY, JJ., agree.